(2)

No. 91-1509

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR. and MARGARET ACUNA,

Petitioners,

vs.

BAY AREA BANK & TRUST,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Court of Appeals for the Fifth Circuit properly upheld the District Court's grant of summary judgment in favor of respondent.

A. Whether there was a genuine issue of material fact regarding notice of interest rate changes.

B. Whether there was a genuine issue of material fact regarding amortization requirements.

II. Whether the grant of summary judgment in favor of respondent violated petitioners' due process or equal protection rights or the right to a jury trial.

III. Whether petitioner has standing to challenge, for the first time on appeal: (1) the District Court's grant of summary judgment in favor of respondent when it is alleged that respondent's motion for summary judgment did not address all of petitioners' causes of action; (2) the relevance of petitioners' Hispanic ancestry to a denial of the right to a jury trial; and/or (3) alleged violations of Code of Federal Regulations' provisions applicable to the Small Business Administration (SBA) in activities between the respondent and the SBA.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Fifth Circuit are those in the caption and those listed by petitioners on page ii of their petition.

Bay Area Bank & Trust, filing this brief in opposition to the petition for a writ of certiorari, as respondent in this proceeding, states that this is its original designation of corporate relationships and that it has no parent companies, subsidiaries and/or affiliates which have issued stock to the public.

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No. 91-1509

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GULF COAST HELICOPTERS, INC, EDWARD ACUNA, SR. AND MARGARET ACUNA,

Petitioners,

vs.

BAY AREA BANK & TRUST,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent (the "Bank" herein) respectfully prays that the

petition for certiorari requested by petitioners (the "Borrowers" herein) for the review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on December 23, 1991, be denied.

OPINIONS BELOW

The opinion of the District Court (Petitioners' Appendix A) is unreported. The opinion of the Court of Appeals for the Fifth Circuit (Petitioners' Appendix B) is not to be published. This Court denied the petition for writ of certiorari in the companion case on January 7, 1992 (Petitioners' Appendix C).

STATEMENT OF JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Respondent does not disagree with petitioners' petition for writ of certiorari with respect to the Constitutional Provisions and Statutes.

STATEMENT OF THE CASE

The facts of the case are stated fully in the decision of the Court of Appeals for the Fifth Circuit (Petitioner's Appendix B, A-5, A-6).

SUMMARY OF ARGUMENT

In respondent's view, petitioners have misdescribed the Questions Presented for Review which actually arise on the record

of this proceeding; and, in part, it is because of such misdescription, that petitioners' argument fails to raise any issues warranting grant of certiorari. Certainly, petitioners have not claimed that the Court of Appeals decision in this case conflicts with a decision of this Court or of another United States Court of Appeals on the same matter. As can be seen below, no real constitutional question has been presented nor has the Court of Appeals decision ". . . so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10.1.

The only substantive issue before this Court is whether the Court of Appeals for the Fifth Circuit erred in affirming the District Court's grant of summary judgment in favor of respondent. The District Court properly decided, and the Court of Appeals correctly affirmed, that summary judgment was proper because there were no genuine issues of material fact with respect to: (1) whether the Bank's monthly note notices satisfied notice requirements and (2) whether the Bank was obligated to fully amortize the loan over the term of the note. All of the other issues of which petitioners complain are subsumed within the above; that is, whether petitioners were deprived of their rights to due process, to equal protection, and to jury trial simply because the District Court granted the Bank's motion for summary judgment.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS FOR THE FIFTH CIRCUIT CORRECTLY UPHELD THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENT.

A. Notice of Interest Rates Was Given.

The petitioners (Borrowers) contend that the note was

ambiguous as to the notice required of interest rate changes. Borrowers also complain that the Bank did not send them proper notice of the quarterly rate changes. Because of these reasons, Borrowers say that the District Court erred in granting the Bank summary judgment, and the Court of Appeals for the Fifth Circuit erred in upholding the summary judgment.

The District Court never did find, nor was it asked to find, that the promissory note in this case was ambiguous. However, on appeal petitioners first complained that the note provisions regarding notice were ambiguous and, therefore, interpretation of the ambiguous provisions must be a question of fact which would prevent summary judgment. This contract arose in Texas and is not a federal contract. Therefore, Texas law, not federal law, controls questions involving the contract dispute. The notes upon which petitioners base their claim do not require constitutional interpretation and no federal question arises related to these notes (Petitioner's Appendix J at A-16, Petitioner's Appendix K at A-18).

The question of whether a contract is ambiguous is one of law. *R&P Enterprises v. La Guarta, Gavrel & Kirk,* 596 S.W.2d 517, 518 (Tex. 1980). The trial court has the responsibility of interpreting the language of an ambiguous contract as a matter of law. *Tower Contracting Co., Inc. v. Flores,* 302 S.W.2d 396 (Tex. 1957).

Petitioners admitted receiving notices each month, on or about the 10th day of the month, which indicated, among other things, the interest rate and the balance due on the note. (*See* Petition for Writ of Certiorari at 1-2, Petitioner's Appendix O at A-24, A-25). The record shows that the petitioners admitted receiving these notices, and admitted taking note of the interest rate changes (Petitioner's Appendix EE at A-75).

Petitioners argue that they are excused from paying the balance due on the note because the Bank failed to give rate change notices on a quarterly basis (which the Bank gave through the monthly note notices). Petitioners have tried to say that this rate change notice was a condition precedent to the Borrower's obligation to pay the balance due on the note. Even if no notice was given, the Bank argues that the language in the note concerning the Bank giving rate change notices is an independent promise and not a condition precedent.

A condition precedent which affects an obligation to perform is an act or event, occurring "subsequently to the making of a contract, that must occur before there is a right to immediate performance and before there is a breach of contractual duty." *Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976).

> While no particular words are necessary for the existence of a condition, such terms as "if", "provided that", "on condition that", or some other phrase that conditions performance, usually connote an intent for a condition rather than a promise. In the absence of such a limiting clause, whether a certain contractual provision is a condition, rather than a promise, must be gathered from the contract as a whole and from the intent of the parties. *Id.*
>
> Where the parties' intent is doubtful or where the result is absurd or impossible, the contract will be interpreted as creating a promise rather than a condition. *Id.*

Conditions in contracts are not favored. A forfeiture as a result of a condition precedent is to be avoided when possible

under another reasonable reading. *See Willow Bend Nat'l Bank v. Commonwealth Mortgage Corp.*, 722 S.W.2d 12, 14 (Tex. App.-Dallas 1986, writ ref'd n.r.e.). If a contract is capable of two constructions, one of which validates and the other of which invalidates the contract, a court must adopt the construction which validates the contract. *Harris v. Rowe,* 593 S.W.2d 303, 306 (Tex. 1979). A breach of an independent promise does not relieve the non-breaching party of the obligation to perform under the contract. *See Mitchell v. Rushing,* 55 Tex. Civ. App. 281, 118 S.W. 582, 585 (1909, no writ).

The note is clear. There is no conditional language. The note itself calls for the interest rate to increase regardless of notice. It does not say the Bank must give quarterly notice before the rate is increased. And even so, the Bank did give monthly notice of interest rates, which the Borrowers acknowledge seeing. There was no breach of any contractual provision. Therefore, petitioners' claims that a fact issue exists regarding the materiality of the alleged breach are irrelevant. Since there was no breach of contract, there can be no fact issue regarding materiality of a breach to preclude summary judgment.

Because of fluctuations in the interest rate charged, there was a balance due on the note when it matured. The Borrowers were notified of these interest rate changes and the balance due on the note by the medium of the note notices.

B. Amortization Was Not Required.

Petitioners argue that the Bank had to amortize this loan out over its seven year term. They based their argument upon only a single admission by the SBA that stated that "the loan was intended or required to be fully amortized during its seven year term." (Petitioner's Appendix L, at A-20). Petitioners throughout their petition try to use admissions by the SBA, in Appendices L, M, V, W, and X, against the Bank, which is prohibited by the Federal Rules of Evidence. Fed. R. Evid. 613(b).

The SBA did not require the Bank to vary the note payments so that the note was completely amortized at the end of seven years. The plain and unambiguous language of the note was that the Bank had the "right" to amortize the note, but not the obligation to do so. "Rights are defined generally as 'powers of freedom action.' " Black's Law Dictionary 1189 (5th Ed. 1979). This is the plain meaning of the word "right" and the District Court did not try to vary that meaning, instead giving the word the meaning it was intended, *Pagel v. Pumphrey,* 204 S.W.2d 58, 64 (Tex. Civ. App.-San Antonio 1947, writ ref'd n.r.e.).

The note itself even addressed the possibility of an additional payment in the end when it stated that payments would be made until paid provided that "all principal and interest not sooner paid shall . . ." be due at the end of the note's term (Petitioner's Appendix J, at A-16). By its own language, this note did not contain a balloon payment, as petitioner refers to, but rather the note merely contemplated an additional payment due at the end of the note's term due to interest rate fluctuations.

Nor would it have been particularly helpful to vary the note payments. As Mr. Acuna testified, level payments are easier to plan for and make it easier to operate his business.

The question of changing the installment payment is one of law to be decided by the District Court. *National Bank of Commerce of San Antonio v. United States,* 369 F. Supp. 990 (W.D. Tex. 1973), *aff'd mem.*, 491 F.2d 1271 (5th Cir. 1974).

Also please note, at page 13-14 of the petition, petitioners interpret *Sahadi v. Continental Illinois National Bank & Trust Co.*, 706 F.2d 193 (7th Cir. 1983). In the text interpreting this case, petitioners refer to the bank involved in *Sahadi* as "BANK," the same short form petitioner uses to refer to respondent throughout the petition, thus creating confusion as to whom petitioner is referring.

II.

THE GRANT OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENT DID NOT VIOLATE DUE PROCESS OR EQUAL PROTECTION RIGHTS OR THE RIGHT TO A JURY TRIAL.

Petitioners complain that they were deprived of their constitutional rights to due process, to equal protection and to a jury trial. This claim is solely based on the notion that any summary judgment deprives the losing party of constitutional rights. There is no question, however, that petitioners were given ample opportunity to present their case both to the District Court and to the Court of Appeals for the Fifth Circuit for consideration (Petitioner's Appendix AA, at A-46). Petitioners were represented in the proceedings below at all times including the hearing on the summary judgments, by lawyers. Petitioners do not deny this. Petitioners have not complained that they were not given an opportunity to respond to the Bank's motion for summary judgment, nor given an opportunity to be heard in open court; they were. They have not complained that they were not given an opportunity to appeal the grant of summary judgment against them; they were. Similarly, petitioners' contention at page 17 of the petition that the lower courts justified granting the summary judgment based on the District Court's backlog of cases is wholly unsupported.

There is nothing in the rules which states that the District Court must have a hearing on a motion for summary judgment (though it did) before it is disposed of. Fed. R. Civ. P. 56. The summary judgment motions could have disposed of on briefs. S.D. Tex. Loc. R. 6.

As long as petitioners were granted an opportunity to be heard on the motion for summary judgment through written response

or oral argument or both (as here), the granting of the summary judgment is not a denial of due process. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 863 (5th Cir. 1970).

If there are no genuine issues of material facts at issue, then there does not have to be a jury trial " . . . the right to a trial by jury does not prevent a court from granting summary judgment." *Plaisance v. Phelps*, 845 F.2d 107, 108 (5th Cir. 1988).

As a history of the case shows, the cause pending now before this Court is a companion case to one in which writ of certiorari was denied on January 27, 1992. In the petition for writ of certiorari to review the decision of the Court of Appeals for the Fifth Circuit upholding summary judgment in favor of the SBA, Cause No. 91-667, this Court had before it substantially the same issues which are raised by petitioners now in this petition. Respondent urges the Court to reject petitioners' arguments as it did in the companion case. Petitioners have not shown that they were denied due process, equal protection, or their right to a trial by jury. Manifestly, there is no important question of constitutional law requiring review by this Court.

III.

PETITIONER DOES NOT HAVE STANDING TO CHALLENGE, FOR THE FIRST TIME ON APPEAL: (1) THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENT WHEN IT IS ALLEGED THAT RESPONDENT'S MOTION FOR SUMMARY JUDGMENT DID NOT ADDRESS ALL OF PETITIONERS' CAUSES OF ACTION; (2) THE RELEVANCE OF PETITIONERS' HISPANIC ANCESTRY TO A DENIAL OF THE RIGHT TO A JURY TRIAL; OR (3) ALLEGED VIOLATIONS OF CODE OF FEDERAL REGULATIONS PROVISIONS APPLICABLE TO THE SMALL BUSINESS ADMINISTRATION (SBA) IN ACTIVITIES BETWEEN THE BANK AND THE SBA.

In petitioners' Questions Presented for Review at page "i" of the petition, petitioners allude to one topic which is never even addressed in the petition itself, the relevance of petitioners' "Hispanic ancestry" to an alleged violation of the Seventh Amendment. In addition, petitioners also claim in the Questions Presented for Review, in the Statement of the Case, and in the Case History Factual that summary judgment was improper because respondent's motion for summary judgment did not address all of petitioners' causes of action and respondent only asked for partial summary judgment.

Respondent's motion for complete summary judgment addressed every cause of action raised in petitioners' pleadings. Petitioners' complaint seems to be that respondent did not address the supplemental issue which petitioners were permitted to add immediately prior to the summary judgment hearing which involved a separate loan and the land collateral thereon (Appendix A). However, respondent's second motion for summary judgment and brief in support thereof addressed every issue raised in petitioners' pleadings, including their supplemental pleadings

(Appendix B). The land lien issue was fully addressed during oral argument before the District Court. The District Court properly decided the land lien was not controlling, but out of an abundance of caution, the District Court had the Bank file its second summary judgment so as to include the issue on the land and its lien (Appendix B). He then promptly granted summary judgment as to all issues (Petitioner's Appendix A, at A-1). There is no support for petitioners' contention that respondent moved only for partial summary judgment.

The above described points are not adequately addressed in the body of the petition and therefore these issues are insufficient to warrant review by this Court. More importantly, however, these points are improperly being raised for the first time in the petition for writ of certiorari. Absent exceptional circumstances, this Court should decline to consider questions presented for the first time in the petition for certiorari that have not been considered by the trial or appellate courts below. *United States v. Lovasco,* 431 U.S. 783, 788 n.7, 97 S. Ct. 2044, 2048 n.7 (1977); *Patrick v. Burget,* 486 U.S. 94, 99 n.5, 108 S. Ct. 1658, 1662 n.5 (1988); and *Kosak v. United States,* 465 U.S. 848, 850 n.3, 104 S. Ct. 1519, 1521 n.3 (1984). Although petitioners were given every opportunity to raise all challenges to the District Court's ruling in their appeal to the Court of Appeals for the Fifth Circuit, no challenge has previously been made regarding any alleged failure of respondents to address all of petitioners' causes of action or to any claims regarding petitioners' Hispanic ancestry. This Court should decline to hear issues not presented to the Court of Appeals. *Kosak,* 465 U.S. at 850 n.3.

Petitioners demand certiorari because they claim the Bank violated provisions of the Code of Federal Regulations applicable to the Small Business Administration. As stated above, this Court has already denied certiorari in the companion case which involved the SBA and raised similar claims regarding C.F.R. violations.

These claims proved unsuccessful against the SBA so petitioners are now attempting them again, against the Bank. The case involving the SBA is over and the SBA has been paid in full for their damages. The C.F.R. provisions specifically apply to activities between the Bank and the SBA which did not involve the Borrowers. And in any event, the plain meaning of these regulations clearly do not support petitioners' interpretations.

Petitioners first claim a violation of 13 C.F.R. § 119.31(b) which reads "SBA shall not be obligated to purchase the guaranteed percentage unless SBA shall first determine that any failure by lender to provide timely and accurate quarterly status information caused no substantial harm to the Government." Obviously this provision has no effect on the Bank's rights to pursue payments under the note. This provision merely makes the SBA not obligated to purchase a note under certain circumstances. In this case, the SBA chose to purchase the note, regardless of whether it was obligated to do so or not.

Petitioners' next claim that the Bank violated 13 C.F.R. § 122.21 by allegedly failing to send the SBA notice of interest rate changes. Again, a violation of this provision has no effect on the Bank's rights to pursue full payment of the note. In addition, the provision conveys rights to the SBA, not to petitioners, which the SBA may enforce against the Bank. 13 C.F.R. § 140.1 regarding the collection of debts owed to the SBA states that the failure of the SBA to comply with any provision of the related regulations shall not be available as a defense to the debtor. This languate demonstrates that the C.F.R. provisions related to the SBA were not intended to be used by debtors. Similarly, petitioners have no standing to base complaints on violations of the SBA's Standard Operating Procedures. Petitioners' complaints regarding the SBA's failure to investigate the Bank's administration of the loan is irrelevant to this cause.

All complaints against the SBA have previously been denied certiorari review as referenced above.

Finally, all of the above contentions relating to violations of C.F.R.'s are improperly being raised for the first time in this appeal. Petitioners had every opportunity to have these claims heard in the lower courts but failed to bring them to the attention of the courts below. Therefore, these claims are improper basis for certiorari. *Kosak,* 465 U.S. at 850 n.3; *Lovasco,* 431 U.S. at 788 n.7; and *Patrick,* 486 U.S. at 99 n.5.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

CHARLES M. JORDAN
Counsel of Record
BARLOW, TODD, JORDAN & OLIVER
Attorneys for Respondent

APPENDIX A — MOTION TO ALLOW SUPPLEMENT TO THIRD-PARTY COMPLAINT

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-88-2737

UNITED STATES OF AMERICA,

Plaintiff

vs.

GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR., and MARGARET ACUNA,

Defendants.

GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR., and MARGARET ACUNA,

Third-Party Plaintiffs,

vs.

BAY AREA BANK & TRUST,

Third-Party Defendant.

MOTION TO ALLOW SUPPLEMENTAL
TO THIRD-PARTY COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Appendix A

Now Comes GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR., and MARGARET ACUNA, Defendants and Third-Plaintiffs and file this their request to the Court to allow supplementation to Third-Party Complaint and would show unto the Court as follows:

1. Supplementary discovery information was provided by BAY AREA BANK & TRUST on July 18, 1990 which allowed the necessary interest calculations to be made to determine the existence of an additional claim against BAY AREA BANK & TRUST.

2. Additional claims made in the "Supplement to Third-Party Complaint" simply conform the pleadings to the issues raised in BAY AREA BANK & TRUST's "Motion for Summary Judgment" and GULF COAST's "Response to Motion for Summary Judgment".

ATTEMPT TO CONFER

On August 9, 1990 Attorney for Defendants and Third-Party Plaintiffs conferred with William A. Wirth, Special Assistant U.S. Attorney who does not oppose the above Motion; Charles M. Jordan was on vacation on the date above indicated. Therefore, this matter is being presented to the Court for determination.

Respectfully submitted,

s/ R.L. Mays, Jr.
R.L. MAYS, JR.
8049 Midcrown Dr., #200
San Antonio, Texas 78218
(512) 657-7772
TBN: 13308200
SDN: 11606

Appendix A

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion to Allow Supplement to Third-Party Complaint was delivered in accordance with Fed. Rule of Civil Procedure 5 to: Mr. Charles Jordan, BARLOW, TODD, JORDAN & OLIVER, 17225 El Camino Real, Suite 400, Houston, Texas 77058 and by regular mail; postage prepaid to: Mr. William Allen Wirth, Special Assistant U.S. Attorney, P.O. Box 61129, Houston, Texas 77208 on this the 9th day of August, 1990.

s/ R.L. Mays, Jr.
R.L. MAYS, JR.

Appendix A

SUPPLEMENT TO GULF COAST HELICOPTERS, INC., ET. AL.'S THIRD PARTY COMPLAINT AGAINST BAY AREA BANK & TRUST

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-88-2737

UNITED STATES OF AMERICA,

Plaintiff

vs.

GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR., and MARGARET ACUNA,

Defendants.

GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR., and MARGARET ACUNA,

Third-Party Plaintiffs,

vs.

BAY AREA BANK & TRUST,

Third-Party Defendant.

TO THE HONORABLE JUDGE LYNN N. HUGHES:

Appendix A

Third-Party Plaintiffs, GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR., and MARGARET ACUNA ("GULF COAST"), files this supplement to Gulf Coast Helicopters, Inc. et.al's Third Party Complaint Against Bay Area Bank & Trust pursuant to Fed. R. Civ. P., Rules 15b and 15d, and request the Court to allow Third-Party Plaintiffs to supplement their "Third-Party Complaint" and would show unto the Court as follows:

1. The general pleading information contained hereinbelow is simply to update the pleadings of Third-Party Plaintiffs and conform the pleadings to evidence. Specific information has been detailed in the "Response of Gulf Coast Helicopters, Inc., Edward Acuna, Sr., and Margaret Acuna to United States of America's Motion for Summary Judgment" ("GULF COAST'S RESPONSE"), as supplemented, filed previously herein, which is incorporated herein by reference for all purposes.

2. GULF COAST wishes to add an additional cause of action against Third-Party Defendant in accordance with information provided on July 18, 1990 as additional response to discovery by BAY AREA BANK & TRUST ("BABT") concerning Loan No. 5679. The interest rates provided by BABT demonstrates that GULF COAST was also overcharged on Loan No. 5679, more particularly described as a Promissory Note in the original principal amount of Seventy-Eight Thousand Dollars ($78,000.00) executed in Houston, Harris County, Texas on March 8, 1984. The interest rate information provided by Third-Party Defendant shows that Third-Party Defendant demanded and collected an excessive overcharge from Third-Party Plaintiffs in the approximate amount of Two Thousand Five Hundred Forty-Nine Dollars and 52/100 ($2,549.52).

Appendix A

3. Third-Party Plaintiffs allege usurious charges by BABT concerning the land loan (Loan No. 5679).

4. Third-Party Plaintiffs allege breach of contract by BABT concerning the land loan (Loan No. 5679).

5. Third-party Plaintiffs plead estoppel concerning the assertions of waiver by BABT.

6. Third-Party Plaintiffs plead waiver by BABT concerning its ability to collect any alleged deficiency concerning the One Hundred Fifty Thousand Dollars ($150,000.00) loan.

7. Third-Party Plaintiffs allege breach of fiduciary duty against BABT.

Respectfully submitted,

s/ R.L. Mays, Jr.
R.L. MAYS, JR.
8049 Midcrown Dr., #200
San Antonio, Texas 78218
(512) 657-7772
TBN: 13308200

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Supplement To Gulf Coast Helicopters, Inc. et.al's Third-Party Complaint Against Bay Area Bank & Trust was delivered in accordance with Fed. R. Civ. P. 5 to: Charles M. Jordan, BARLOW, TODD, JORDAN & OLIVER, 17225 El Camino Real, Suite 400, Houston, Texas 77058 and to Mr. William

Appendix A

A. Wirth, Special Asst. U.S. Attorney, P.O. Box 61129, Houston, Texas 77208 on this the 9th day of August, 1990.

s/ R.L. Mays, Jr.
R.L. MAYS, JR.

APPENDIX B — BAY AREA BANK & TRUST'S SECOND MOTION FOR SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-88-2737

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GULF COAST HELICOPTER, INC., ET AL,

Defendants.

GULF COAST HELICOPTERS, INC., ET AL,

Third-Party Plaintiffs,

vs.

BAY AREA BANK & TRUST,

Third-Party Defendant.

BAY AREA BANK & TRUST'S SECOND MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Third-Party Defendant, BAY AREA BANK & TRUST ("The

Appendix B

Bank"), respectfully moves this Court to enter summary judgment in favor of Third-Party Defendant, and against Third-Party Plaintiffs, GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR., and MARGARET ACUNA, pursuant to Rule 56, F.R.C.P., on the ground that there is no genuine issue as to any material fact, and that Third-Party Defendant therefore is entitled to summary judgment as a matter of law.

In support of this motion Third-Party Defendant refers to the Memorandum, Affidavit, and Exhibits attached, and to the pleadings on file in this case. Further, Third-Party Defendant incorporates herein by reference for all purposes its "Motion for Summary Judgment" plus all exhibits attached thereto, regarding the $150,000.00 loan previously filed and granted herein.

WHEREFORE, PREMISES CONSIDERED, Third-Party Defendant moves this Court to enter summary judgment against the Third-Party Plaintiffs named above, that Third-Party Plaintiffs take nothing by this suit, and that Third-Party Defendant recover costs.

Respectfully submitted,

BY: s/ Charles M. Jordan
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ATTORNEY IN CHARGE FOR
BAY
AREA BANK & TRUST

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OF COUNSEL:
BARLOW TODD JORDAN & OLIVER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Bay Area Bank & Trust's Motion for Summary Judgment has been forwarded to R. L. Mays, Jr., 8049 Midcrown, Suite 200, San Antonio, Texas 78218 and to William Allen Wirth, Special U.S. Attorney, 440 Louisiana, Suite 800, Houston, Texas 77208 via certified mail, return receipt requested, on this the 18th day of September, 1990.

s/ Charles M. Jordan
CHARLES M. JORDAN

WP/FILES/BABT-GCH.2SJ

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IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-88-2737

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-88-2737

UNITED STATES OF AMERICA,

Plaintiff

vs.

GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR., and MARGARET ACUNA,

Defendants.

GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR., and MARGARET ACUNA,

Third-Party Plaintiffs,

vs.

BAY AREA BANK & TRUST,

Third-Party Defendant.

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MEMORANDUM IN SUPPORT OF BAY AREA BANK & TRUST'S SECOND MOTION FOR SUMMARY JUDGMENT

COMES NOW, BAY AREA BANK & TRUST ("The Bank"), and files this its Memorandum in Support of its Motion for Summary Judgment.

STATEMENT OF FACT

1.

On or about March 8, 1984, Edward Acuna, Sr., as President of Gulf Coast Helicopters, Inc., executed and delivered a Promissory Note payable to the order of the Bank, in the original principal amount of $78,000.00 (the "land loan"). The Note and Deed of Trust are attached hereto as Exhibits "A" and "B" respectfully, and incorporated herein by reference.

2.

Interest on the land note was a variable rate equal to 3% per annum above the prime rate. Each change in the variable rate was effective, without notice, on the effective date of each change in the prime rate. Principal and interest were due in 60 monthly installments of $1,814.92, or more, payable on the 8th of every month. Third-Party Plaintiffs paid this Note off in November of 1988.

3.

Exactly one week before a hearing on the Motion for Summary Judgment of all parties, Third-Party Plaintiffs filed their Motion to Allow Supplementation to Third-Party Complaint, and

the Supplement thereto, attached hereto as Exhibits "C" and "D" respectfully and incorporated herein by reference. The Supplement contains new causes of action regarding the $150,000.00 Note, which is the subject of this lawsuit. The Supplement also contained three new causes of action regarding the above described $78,000.00 land loan, a transaction which is not a part of the present lawsuit and not related in any way. It is an entirely different Note, made at a different time, under different terms, and with different collateral. The Bank submits that these new claims regarding the land loan, being introduced at this late date, are very harmful and prejudicial to the Bank.

4.

At the hearing on August 17, 1990, the United States of America, Plaintiff, and the Bank, were both granted summary judgments on the entire action regarding the $150,000.00 Note. Third-Party Plaintiffs were not left with any causes of action against the Bank, except those raised in their Supplement. The Bank now requests this Court to grant it a Motion for Summary Judgment on the following causes of action raised by Third-Party Plaintiffs in their Supplement to their Third-Party Complaint.

USURY

5.

Third-Party Plaintiffs allege in their Supplement, that the Bank overcharged them $2,549.52 on the land loan, thus the interest charged was usurious. However, Third-Party Plaintiffs have produced no evidence that this Note is usurious, except a mechanical, number crunching exercise of what the straight amortization should be. See Defendants' and Third-Party

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Plaintiffs' Supplemental Production Response, the Amortization of Loan 5679, attached hereto as Exhibit "E", and incorporated herein by reference. As set forth in *Fears, Individually and as Officer and Director of Bill Fears Mobile Offices, Inc. v. Mechanical & Industrial Technicians, Inc.*, 654 S.W.2d 524 (Civ.App. - Tyler [12th Dist.] 1983, writ ref'd n.r.e.), the elements of a usury cause of action are: (1) loan, forbearance, or detention of money, express or implied; (2) absolute obligation or understanding that principal will be repaid; (3) be an understanding that interest in excess of that authorized by law is to be paid for the loan; and (4) an intention by the lender to extract usurious interest.

6.

The $150,000.00 Note is not on its face usurious, it does not call for an unlawful interest rate. Thus, it is Third-Party Plaintiff's obligation to establish that there was a corrupt agreement or scheme to recover usury and that such scheme was in full contemplation by the parties. *Richards v. Moody,* 422 S.W.2d 200, 202 (Tex.Civ.App. - Houston [14th Dist.] 1967, writ ref'd n.r.e.), *Wagner v. Austin Savings & Loan Association,* 525 S.W.2d 724, 727 (Tex.Civ.App. - Beaumont 1975, no writ). Third-Party Plaintiffs have not even suggested in their Third-Party Complaint or the Supplement thereto, or in any testimony, that there was a corrupt agreement, or that the Bank had an objective intent to recover usury, and that such agreement was in full contemplation of the Bank. Therefore, Third-Party Plaintiffs' usury cause of action must fail, because there was no understanding that the interest on the Note was in excess of that authorized by law. Nor was there an intention to extract usurious interest as established by the Affidavit of Harold Herman, attached hereto as Exhibit "F", and incorporated herein by reference.

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Further, this Affidavit establishes that the method Third-Party Plaintiffs used to compute the allegedly usurious interest is incorrect. It does not, as a matter of law, show an intent to charge interest in excess of that authorized by law. Therefore, Third-Party Plaintiffs cannot prove their usury cause of action, and the Bank is entitled to a summary judgment as a matter of law.

BREACH OF FIDUCIARY DUTY

7.

Third-Party Plaintiffs allege that the Bank breached its fiduciary duty. However, there is no authority in Texas which imposes the duty of good faith and fair dealing on lenders in general to their borrowers. *Nautical Landings Marina, Inc. v. First National Bank of Port Lavaca,* 791 S.W.2d 293, 299 (Tex.App. — Corpus Christi 1990). Generally, the duty of good faith and fair dealing does not exist in Texas unless created by either express contractual language or unless a special relationship of trust and confidence exists between the parties. *Nautical* at 299; *Arnold v. National County Mutual Fire Insurance Co.,* 725 S.W.2d 165, 167 (Tex. 1987).

8.

The Bank's Affidavit conclusively establishes the absence of a contractual agreement of good faith and fair dealing or a long standing special relationship between the parties. Therefore, the Bank had no fiduciary duty and it is entitled to a summary judgment as a matter of law on this cause of action.

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BREACH OF CONTRACT

9.

In their Supplement, Third-Party Plaintiffs allege breach of contract by BABT concerning the land loan. Third-Party Plaintiffs do not elaborate on this allegation. The Bank therefore must assume that Third-Party Plaintiffs mean that because the Bank allegedly charged usurious interest, the Bank breached its contract with Third-Party Plaintiffs. This cause of action, therefore, necessarily rests on whether or not the interest charged by the Bank was usurious. The Bank has in its previous section on usury established as a matter of law, that Third-Party Plaintiffs cannot prove the elements of usury. Further, the Bank has, in the Affidavit of Harold Herman, established that the interest charged on the land loan is not usurious. The Bank has fulfilled all of its obligations under the terms of the Note and the Deed of Trust, and therefore, there is no proof of Third-Party Plaintiffs' breach of contract cause of action, and the Bank is entitled to a summary judgment as a matter of law.

ESTOPPEL

10.

In their Supplement, Third-Party Plaintiffs plead estoppel concerning the assertions of waiver by the Bank. The Bank, again having to read between the lines, assumes that Third-Party Plaintiffs mean the Bank should be estopped from asserting its waiver defense by its alleged failure to give prime rate change notices and /or raise and lower their monthly payments, under the $150,000.00 loan.

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11.

The elements of estoppel are that there must have existed: (1) a false representation or concealment of material fact; (2) made with knowledge, actual or constructive, of those facts; (3) to a party without knowledge or the means of knowledge of those facts; (4) with the intention that it should be acted on; and (5) the party to whom it was made must have relied or acted on it to his prejudice. *Nelson v. Jordan,* 663 S.W.2d 82 (Tex.App. Austin 1983, writ ref'd n.r.e.). The basis of estoppel is deception and in its absence there can be no estoppel. *Kelly v. Heimer,* 312 S.W.2d 430 (Tex.Civ.App. — San Antonio 1958, writ ref'd n.r.e.). There is no evidence in this cause to support any element of equitable estoppel. The Bank did not make any false representations or concealments, with knowledge or not, to anyone involved in this lawsuit. No one involved in this lawsuit relied to their detriment or prejudice upon anything, said or done at any time by the Bank. Further, there is no evidence of any deception on the part of the Bank. Thus, there can be no equitable estoppel.

12.

Third-Party Plaintiffs testified that the Bank did not make any oral misrepresentations. They testified that they did not ask for any information, or help, they just read the $150,000.00 promissory note and signed it. (Dep. of Edward Acuna, Vol. II, p. 213, l. 19-23). Third-Party Plaintiffs knew that the interest rate was fluctuating, but did not do anything about this loan, because they were too busy and didn't pay any attention. (Dep. of Edward Acuna, Vol. I, p. 72, l. 23-25). Mr. Acuna testified that he was aware of the stipulations in the Note about notices, and that he would probably get an increase in payments when

the rates went up, but at the time business was good and he did not have a problem making the payments. (Dep. of Edward Acuna, Vol, I, p. 55, l. 25, and p. 56, l. 5). There is plenty of evidence that Third-Party Plaintiffs knew exactly what was happening with this loan. Everything about his loan was fully and equally open to Third-Party Plaintiffs for their inquiry and investigation. They admitted that they had all of the loan documents and they were given plenty of time to read them, and that they did review them before signing. (Dep. of Edward Acuna, Vol. I, p. 47, l. 14-19). Further, they have testified that the Bank always treated them correctly. (Dep. of Edward Acuna, Vol. I, p. 50, l. 1-9).

13.

Furthermore, this equitable estoppel cause of action is moot. The Court granted the Bank's Motion for Summary Judgment, which includes the Bank's waiver defense. The Bank argued and this Court agreed that even if Third-Party Plaintiffs could prove any of their causes of action regarding this $150,000.00 loan, Third-Party Plaintiffs had long since waived any right they might have had to sue the Bank. Therefore, the Bank is entitled to a summary judgment as a matter of law.

WAIVER

14.

In its Supplement, Third-Party Plaintiffs plead waiver by the Bank concerning its ability to collect any alleged deficiency on the $150,000.00 Note. The elements of waiver are:

(1) existing legal right, benefit or advantage, *Smith*

v. McKnight, 240 S.W.2d 368, 371 (Tex.Civ.App. — Amarillo 1951, no writ);

(2) knowledge of its existence, actual or constructive, *Loggins v. Gates,* 301 S.W.2d 525, 528 (Tex.Civ.App. — Waco 1950, writ ref'd n.r.e.); and

(3) actual intention to relinquish it or such conduct as will warrant an inference of the relinquishment of the rights in question, *Stowers v. Harper,* 376 S.W.2d 34, 39 (Tex.Civ. App. — Tyler 1964, writ ref'd n.r.e.).

The term waiver implies a choice or an election to dispense with something of value, or to forego some advantage that might have been demanded.

15.

Third-Party Plaintiffs fail to tell us what existing valuable, legal right the Bank possessed that it intentionally relinquished so as to waive its right to the deficiency left due and owing on the Note. Was it the Bank's right to raise and lower Third-Party Plaintiffs' monthly payments so as to amortize the Note? If so, the Note clearly says the Bank "may" raise or lower the monthly payments to fully amortize the loan within the loan term. This is not ambiguous. The Bank did not give up a valuable legal right when it chose not to raise and lower the payments. The Bank had the right *not* to change the payments as well. The Bank did not relinquish anything in this situation.

16.

If Third-Party Plaintiffs are referring to the Banks alleged

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failure to send prime rate changes notices, as relinquishing a right, the Bank sent monthly note notice for seven years, as has already been established. The Bank did not give up a right in this regard. Therefore, Third-Party Plaintiffs have failed to prove the elements of the cause of action of waiver, and the Bank is entitled to a summary judgment as a matter of law. Also, the Court has already ruled on the summary judgment as its relates to the $150,000.00 note.

17.

Because there is no genuine issue of any material fact in regard to Third-Party Plaintiffs' Supplement to its Complaint, the Bank is entitled to Judgment as a matter of law, and respectfully requests this Court to grant its Motion for Summary Judgment concerning the Supplement.

Respectfully submitted,

s/ Charles M. Jordan
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OF COUNSEL:
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